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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1342

DANIEL McMANN, Warden of Auburn State Prison, Auburn, New York,

Petitioner,

against

CRAIG S. OWEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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IN THE

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No.

DANIEL MCMANN, Warden of Auburn State Prison, Auburn, New York,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Auburn State Prison, Auburn, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Craig S. Owen* v. *McMann*. The judgment was entered on December 8, 1970. On January 11, 1971, upon application by petitioner, the Court of Appeals stayed issuance of its mandate to discharge the respondent unless he were promptly retried, pending application to this Court for a writ of certiorari.

Citations to Opinions Below

The opinion of the United States District Court for the Northern District of New York granting the respondent's application for a writ of habeas corpus is reproduced as Appendix "A" to this petition. The opinion of the United States Court of Appeals for the Second Circuit affirming the order of the District Court is reproduced as Appendix "B" to this petition. The order of the United States Court of Appeals for the Second Circuit dated January 11, 1971 staying the issuance of its mandate is reproduced as Appendix "C" to the petition. The affidavits of jurors Kassouf and Tucker are reproduced as Appendix "D" and "E" respectively.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Does the Sixth Amendment right of confrontation held by this Court in *Parker* v. *Gladden,* 385 U. S. 363, to shield a defendant in a state criminal prosecution against the unauthorized comments to the jurors by an officer of the Court and the State, extend to a protection against extra-record statements made by jurors themselves, during the course of their deliberations, untainted by any unauthorized invasions?

Statement of the Case

The respondent was convicted in the Oneida County Court after trial by jury with a co-defendant, of the crimes of robbery, first degree, assault, second degree and grand

larceny, first degree. Respondent was sentenced on April 6, 1966 to a term of 10 to 15 years on the robbery conviction, five to ten years on the larceny conviction and 2½ to 5 years on the assault conviction; said sentences to be served concurrently.

Prior to the imposition of sentence respondent's attorney, Mr. Tierney, obtained an affidavit from one juror, Thomas S. Kassouf. In the affidavit, Kassouf averred that the jury foreman, Mr. Jeffrey, and two other jurors, Mrs. Janek and Mrs. Taurisano, informed the other jurors that they "knew all about" Craig Owen (respondent), and referred to unfavorable incidents in Owen's life which were unrelated to the charge (32a). Another juror, Mr. Tucker, made an affidavit that these same three jurors "informed the jury that they knew various things about Craig Owen and that they had reason to believe from outside information that he was guilty" (36a).*

At the time of sentence, Mr. Tierney, submitted Kassouf's and Tucker's affidavits in support of a motion for a new trial. This motion was denied. On appeal, respondent challenged the propriety of the alleged infiltration of extra-record evidence into the jury's deliberations. The Appellate Division affirmed the conviction without opinion. *People* v. *Owen,* 28 A. D. 2d 824, 282 N.Y.S. 2d 721 (4th Dept. 1967), and a judge of the Court of Appeals denied leave to appeal on November 3, 1967. Reconsideration of respondent's application for leave to appeal in light of the reargument in *People* v. *DeLucia,* 15 N. Y. 2d 294, 206 N. E. 2d 324 (1965), *cert. denied* 382 U. S. 821, reversed 20 N. Y. 2d 275, 229 N. E. 2d 211 (1967), was again denied.**

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* Arabic numerals in parentheses followed by "a" refer to pages in the appendix.

** Respondent's *initial application* for leave to appeal to the state Court of Appeals was denied *subsequent* to that Court's reversal of its decision in *People* v. *DeLucia, supra.*

The respondent thereafter applied for a federal writ of habeas corpus contending *inter alia* that he had been deprived of his Sixth Amendment right to confrontation by the jury's considering extra-record statements about him by three jurors.

The District Court ordered that an evidentiary hearing be held on the allegations contained in the affidavits of the two above named jurors. Kassouf and Tucker testified along the lines of their post-trial affidavits (13-21, 23, 49-50, 70-71, 75-78, 83).* A third juror, Shultz, stated only that some juror had said that "Owen's father was always getting him out of trouble" (277-278, 282-284). Mr. Jeffrey denied having made or heard any adverse statement, save only that one juror had commented that Owen, while a member of the Utica Police Department, had taken a prowl car outside the City limits (158, 164-166, 183-186, 196). Mrs. Janek and Mrs. Taurisano denied having made or heard any comments on matters not in evidence (205 *et seq.*, 249 *et seq.*).

The District Court ruled that the jurors' testimony "establishes that certain derogatory statements were made concerning past activities of the petitioner [respondent herein] . . . which constituted unsworn, uncross-examined testimony of an unconfronted witness or witnesses" (12a).

Thus, the Court concluded that Owen had been deprived of his Sixth Amendment right of confrontation.

The Court of Appeals affirmed in a 14 page opinion basing its decision on a violation of the confrontation clause.

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* Arabic numerals in parentheses refer to pages of the original record on appeal.

Reason for Granting the Writ

The decision below presents an unwarranted expansion of the Sixth Amendment guarantee to a right of confrontation.

The opinion below creates a serious distortion of the application of the Sixth Amendment right of confrontation enunciated by this Court in *Parker* v. *Gladden,* 385 U. S. 363, which will result, if not ruled upon by this Court, in a post trial inquisition of jurors destructive of the sanctity of the jury process.

This Court, in *Parker* v. *Gladden, supra,* invoked the confrontation clause of the Sixth Amendment to the United States Constitution, to shield a defendant from unauthorized comments to the jury by an officer of the Court and by the State.

The Court of Appeals' application of the confrontation clause to the facts of this case, involving extra-record remarks in the jury room made by the jurors themselves, is outside the scope of *Parker* and is a clear departure from previous opinions by this Court. This was explicitly recognized by the Court below.

Thus the Court of Appeals stated:

> "So far as we know the [Supreme] Court has never suggested that jurors, whose duty it is to consider and discuss the factual material properly before them, become 'unsworn witnesses' within the scope of the confrontation clause simply because they have considered any factual matters going beyond those of record." (22a)

The opinion, moreover, constitutes a departure from previous decisions of this Court which have held that jurors' statements, affidavits and depositions are not com-

petent to impeach their duly rendered verdict where they concern purely internal deliberations. *Hyde* v. *United States,* 225 U. S. 347; *McDonald* v. *Pless,* 238 U. S. 264. *Accord: Cunningham* v. *United States,* 356 F. 2d 454 (5th Cir. 1966), *cert. denied* 384 U. S. 952; *Walker* v. *United States,* 298 F. 2d 217 (9th Cir. 1962).

Thus, this Court would not accept the jurors' own disclosures as to a forbidden quotient verdict in a damage case. *Hyde* v. *United States, supra;* nor would it listen to jurors' statements of a compromise in a criminal case whereby some jurymen exchanged their convictions on one issue in return for concessions by other jurymen on another issue. *McDonald* v. *Pless, supra.*

The continuing viability of these principles of law is reflected in this Court's citation of *McDonald* v. *Pless, supra* in *Stein* v. *New York,* 346 U. S. 156, 178, overruled on other grounds *Jackson* v. *Denno,* 378 U. S. 368 and in *Parker* v. *Gladden, supra* at 369 (dissenting opinion Harlan, J.).

Although this Court has noted that exceptions to this rule may be required in the interest of justice to protect the integrity of jury proceedings from unauthorized invasions *from outside sources* (*Mattox* v. *United States,* 146 U. S. 140), there is no Supreme Court case which has held that post-trial inquisition of jurors is permissible to impeach the verdict where the testimony pertains to discussions *in the jury room.**

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* The time to ferret out potentially biased jurors is obviously before trial. As this Court stated in *Darcy* v. *Handy,* 351 U. S. 454:

> "The law recognizes that prejudice may infect any trial and provides protection against it . . . [P]rovision is made for the *voir dire* examination and for challenges of jurors who indicate that they may be prejudiced." *id.* at 462.

The opinion below is an open invitation to a post-verdict harassment of jurors "in the hope of discovering something which might invalidate the finding . . . The result [will] be to make what was intended to be a private deliberation, the constant subject of public investigation to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless, supra,* at 267-268. Thus, the finality attached to the result of the internal deliberations of the jury will be dissipated throughout the land.

It is readily apparent that the disposition here and the newly adopted rule of the Second Circuit are of pervasive effect which should be reviewed by this Court in the interests of the administration of justice.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, New York, February 9, 1971.

Respectfully submitted,

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State of New York
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Samuel A. Hirshowitz
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Iris Steel
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Appendix A.

OPINION OF JUDGE EDMUND PORT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

68-CV-324

UNITED STATES OF AMERICA ex rel. CRAIG S. OWEN,

Relator-Petitioner,

v.

DANIEL MCMANN, WARDEN OF AUBURN STATE PRISON, AUBURN, NEW YORK,

Respondent.

APPEARANCES:

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Deputy Attorney General
Of Counsel

Appendix A.

STUART FERO, Esq.
Assistant District
Attorney of Oneida County
Of Counsel

EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

This case is one of the very rare but unavoidable instances in which a district court judge is placed in the position where he is obliged to vacate a conviction affirmed on appeal in the state courts, because he views the matter differently on constitutional grounds. This must be done herein even though there has been neither a change in the facts nor the law between the state court affirmance and the grant of the instant writ of habeas corpus, which voids the conviction on constitutional grounds.

Craig S. Owen, claiming that the judgment of conviction under which he is presently confined in Auburn State Prison is constitutionally infirm, has petitioned for a writ of habeas corpus. He claims the rights guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution, i.e. the right to a fair and impartial trial by a fair and impartial jury and the right to confront the witnesses against him, were violated.

The petitioner was found guilty after a jury trial in the Oneida County Court of the crimes of Robbery 1st degree, Assault 2nd degree, and Grand Larceny 1st degree. He was sentenced on April 6, 1966 to 10 to 15 years on the robbery conviction, 2½ to 5 years on the assault conviction, and 5 to 10 years on the grand larceny conviction; said sentences to be served concurrently.

After the institution of this proceeding, and although the petitioner had exhausted his state remedies on direct

appeal,[1] he nevertheless applied to the New York Court of Appeals for reconsideration of his application for leave to appeal, in the light of the reargument of *People v. DeLucia*, 15 N. Y. 2d 294, 258 N.Y.S. 2d 377, 206 N. E. 2d 324 (1965) *reargued* 20 N. Y. 2d 275, 282 N.Y.S. 2d 526, 229 N. E. 2d 211 (1967). That court refused to reconsider.[2] Subsequently, hearings on the writ were held in this Court, the minutes were transcribed and the matter submitted for decision.

The issues presented are, essentially, two: (1) was a unanimous verdict of guilty returned, and

(2) was the petitioner deprived of his Sixth Amendment right of confrontation?

Before considering the merits however, it is necessary to resolve an evidentiary problem. During the course of the hearing the respondent, relying on the general rule that "a juror's testimony or affidavit is not receivable to impeach his own verdict,"[3] objected to the admission of virtually all the petitioner's proffered testimony, since it came almost entirely from jurors. I reserved decision as to admissibility, and the evidence was received subject to being stricken.

I have now concluded that evidence of statements made by any juror, concerning the defendant's activities which were not testified to on the trial, should have been re-

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[1] The Appellate Division affirmed without opinion. *People* v. *Owen*, 28 App. Div. 2d 824, 282 N.Y.S. 2d 721 (4th Dept. 1967). Leave to appeal to the Court of Appeals was denied by Judge Bergan on November 3, 1967.

[2] See letter of the petitioner to this court, dated April 29, 1969. this court, the minutes were transcribed, and the matter

[3] *Wigmore on Evidence* § 2345 (McNaughton rev. 1961).

ceived[4] and I so rule. Testimony concerning discussions other than those above, and concerning the method or

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[4] To this court, the better rule is exemplified by the so-called "Iowa" rule, which allows juror's testimony and affidavits in connection with all matters except those that "inhere in the verdict." *Wright* v. *Illinois & Miss. Tel. Co.,* 20 Iowa 195, 210 (1866). Matter which "inheres in the verdict" is, essentially, that which rests alone in a juror's breast, and is incapable of extrinsic disproof.

The "Iowa" rule appears to have been adopted by the Preliminary Draft of Proposed *Rules of Evidence for the United States District Courts and Magistrates,* Rule 6-06 (b) & Advisory Committee's Note thereafter; by the *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury,* § 5.7, pages 164-75 (Approved Draft, 1968); by the *American Law Institute's Model Code of Evidence,* Rule 301, pages 174-76 (1942); further, this would seem to be the rule of *Mattox* v. *United States,* 146 U. S. 140 (1892), which was recognized and reaffirmed in *Miller* v. *United States,* 403 F. 2d 77 (2d Cir. 1968), at p. 83, fn. 11. *Miller* v. *United States,* supra, also referred to, and termed "excellent" the discussion of the problem in *State* v. *Kociolek,* 20 N. J. 92, 98-100, 118 A. 2d 812, 815-16, 58 A.L.R. 2d 545 (1955), which adopted the "Iowa" rule.

The Second Circuit has further indicated that a clear-cut policy of evidentiary incompetence in regard to jurors statements impeaching their verdicts, is not to be favored. *United States ex rel. DeLucia* v. *McMann,* 373 F. 2d 759 (2d Cir. 1967), at pp. 761-62, fn. 1.

The type of prejudicial statements claimed to have been uttered herein, are ones which do not "inhere in the verdict," i.e., they are objective (not subjective) facts which are capable of proof or disproof by the other jurors, and are not incidents within the knowledge and mind of only one juror. In such a case, the evidentiary bar must give way to the requirements and demands of the Sixth Amendment, and proof of this type of statement is admissible and competent.

In conclusion. as the New York Court of Appeals in *DeLucia,* supra, has correctly observed: "where the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that determination is the right of a defendant to prove facts substantiating his claim." 282 N.Y.S. 2d at 528, 20 N. Y. 2d at 277.

manner of voting or balloting on the verdict, should not have been received,[5] and I likewise so rule.

On the basis of the competent evidence I conclude that the petitioner was deprived of his Sixth Amendment right to confront the witnesses against him; therefore, the conviction should be vacated, and the petitioner afforded a new trial. In view of this disposition, it is not necessary to consider the other issue raised.

The Facts

During the course of the trial and during the jury's deliberations, the petitioner contends and the evidence establishes that certain derogatory statements were made concerning past activities of the petitioner. Said activities were not part of the testimony on the trial.

In substance, the jurors or some of them were told by other jurors during the trial and the deliberations: that the defendant had been in trouble all his life; that he had been suspended from the police force in connection with the unauthorized use of a prowl car; that he had been involved in a fight in a tavern; that one of the juror's

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[5] Delving into what was in an individual juror's mind when he assented to the verdict in the juryroom, i.e., that he thought he was assenting only to a verdict of guilty on one count of Grand Larceny, goes beyond the scope of what is permissible under the "Iowa" rule and involves matter "inhering in the verdict"—as such, the jurors' statements and affidavits in regard to this question are not competent to impugn the verdict.

Petitioner also asserts in his *Final Memorandum* that the hearing on the habeas corpus proved that the trial jury did not consider the charges against the petitioner individually, but simply voted upon the three charges as if they were one. This is claimed to violate his 6th Amendment rights. Such a procedure, even if it could be proved by evidence that is competent, would not seem to violate a federal constitutional right under the 6th Amendment.

husband was an investigator and that he knew all about plaintiff's background and character, which was bad; and that petitioner's father was always getting him out of trouble.

The above remarks were made on more than one occasion during the trial and the deliberations.

In their most damaging light, some of these remarks verge on unsworn testimony of other crimes;[6] in their least damaging aspect, they are equivalent to the testimony of an unsworn, adverse character witness called by the prosecutor.[7] Said testimony was not only unsworn, but also was not subjected to cross-examination.

It is difficult for me to see any substantial difference between the violation of Parker's[8] or Delucia's[9] Sixth Amendment rights and the petitioner's. In all three cases, a defendant was or may have been found guilty on the unsworn, uncross-examined testimony of an unconfronted witness or witnesses.

I cannot say, after listening to the evidence produced on the hearing[10] before me, that the constitutional error in the petitioner's trial "was harmless beyond a reasonable doubt,"[11] and I am convinced that "there is a reasonable possibility that the [errors herein] might have contributed to the conviction."[12]

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[6] Unauthorized use of the police car; fighting in the tavern.

[7] The petitioner presented character witnesses. The prosecution did not present witnesses to contradict this character testimony.

[8] *Parker* v. *Gladden,* 385 U. S. 363 (1966).

[9] *People* v. *Delucia,* supra at p. 2 herein.

[10] No evidence on the lack of prejudice was adduced, nor was the point raised.

[11] *Chapman* v. *California,* 386 U. S. 18, 24 (1967).

[12] *United States* v. *Semensohn,* docket nos. 33118, 33521 (2d Cir. Feb. 6, 1970), at p. 1515.

Appendix A.

The foregoing opinion constitutes the court's findings of fact and conclusions of law in accordance with F. R. Civ. P., Rule 52(a).

For the reasons herein, it is

ORDERED, that the convictions challenged herein be and the same are hereby set aside, and it is further

ORDERED, that the respondent Warden, discharge the petitioner Craig S. Owen from custody, unless the State of New York takes such steps as are necessary to return the petitioner to Oneida County, New York, for retrial; said trial is to be held within 60 days of the date hereof, and it is further

ORDERED, that in the event a timely notice of appeal is filed, execution of the judgment herein be and the same hereby is stayed, pending said appeal.

EDMUND PORT,
United States District Judge.

Dated: March 6, 1970, Auburn, New York.

Appendix B.

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 133—September Term, 1970.

(Argued October 21, 1970 Decided December 8, 1970.)

Docket No. 34822

UNITED STATES OF AMERICA *ex rel.* CRAIG S. OWEN,

Petitioner-Appellee,

against

HON. DANIEL J. MCMANN, Warden of Auburn State Prison, Auburn, New York,

Respondent-Appellant.

Before: WATERMAN, Senior Judge,

FRIENDLY and FEINBERG, Circuit Judges.

Appeal from decision of the District Court for the Northern District of New York, Edmund Port, *Judge*, ordering that relator's convictions be set aside and that he be released from custody unless he is promptly retried. Affirmed.

Appendix B.

BRENDA SOLOFF (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, and Iris A. Steel, Assistant Attorney General, of Counsel), *for Respondent-Appellant.*

RICHARD N. BACH, Esq., Utica, New York, *for Petitioner-Appellee.*

FRIENDLY, *Circuit Judge*:

Petitioner Craig S. Owen was tried early in 1966 in the County Court of Oneida County, N. Y., with one Sebregandio, on charges of first degree robbery, second degree assault and first degree grand larceny. After some 13 to 14 hours of deliberation and a report of inability to agree with respect to one defendant, the jury returned to the courtroom around 2 A.M. and the foreman reported both defendants had been found guilty on all counts. When the jury was being polled with respect to Owen, one juror, Thomas S. Kassouf, inquired whether it was possible to convict only of grand larceny "or do we have to have the whole three?" When the judge declined to discuss the matter, Kassouf endorsed the foreman's report. Evidently sensing that something might be amiss, Owen's attorney, Mr. Tierney, obtained an affidavit from Kassouf. In addition to claiming that the foreman, Mr. Jeffrey, had told the jury that it had to find the defendants guilty on all three charges or none[1] but that he and several other jurors had voted to convict on the grand larceny charge alone, Kas-

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[1] Kassouf also claimed that he requested Mr. Jeffrey to ask the judge for instructions on this point but that Jeffrey refused to do so.

souf averred that Jeffrey and two other jurors, Mrs. Janak and Mrs. Taurisano, informed the other jurors that they "knew all about" Craig Owen, and referred to unfavorable incidents in Owen' life which were entirely unrelated to the charge. Another juror, Mr. Tucker, made an affidavit that these same three jurors "informed the jury that they knew various things about Craig Owen and that they had reason to believe from outside information that he was guilty."

At the time of sentence, Mr. Tierney submitted Kassouf's and Tucker's affidavits in support of a motion for a new trial. This was denied. On appeal, Owen challenged the propriety of the alleged infiltration of extra-record evidence into the jury's deliberations, but the Appellate Division affirmed without opinion. *People* v. *Owen,* 28 A. D. 2d 824, 282 N.Y.S. 2d 721 (4th Dept. 1967),[2] and a judge of the Court of Appeals denied leave to appeal. After the second decision in *People* v. *DeLucia,* 20 N. Y. 2d 275, 279, 282 N.Y.S. 2d 526, 530 (1967), seemingly repudiating the New York rule against jurors' impeachment of their verdict in the case of "inherently prejudicial 'outside influences,'" Owen applied for reconsideration of the denial of leave to appeal, but without success.

Owen's petition for federal habeas in the District Court for the Northern District of New York contended, *inter*

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[2] Very lkely this was on the basis of the initial ruling in *People* v. *DeLucia,* 15 N Y 2d 294, 296, 258 N Y S 2d 377, 378, *cert. denied,* 382 U.S. 821 (1965), that "jurors may not impeach their own duly rendered verdict by statements or testimony averring their own misconduct within or without the juryroom; much less can they do so by statements presented in the form of hearsay affidavits." However, we must reiterate previous expressions of regret that in New York prisoner cases raising constitutional claims as substantial as this one, we do not have the benefit of a considered statement, however brief, by a New York appellate court. A quite different case would be presented, for example, if the trial judge or the Appellate Division had indicated disbelief in the affidavits filed.

alia, that he had been convicted on less than a unanimous verdict and had been deprived of his Sixth Amendment right to confrontation by the jury's considering extra-record statements about him by three jurors. Finding the state record insufficient to enable him to dispose of these issues, Judge Port conducted an evidenitary hearing. Kassouf and Tucker testified along the lines of their post-trial affidavits; a third juror, Shultz, stated only that some juror had said that "Owen's father was always getting him out of trouble." Mr. Jeffrey denied having made or heard any adverse statement, save only that one juror (evidently Mrs. Janak, whose husband was an investigator) had commented that Owen, while a member of the Utica Police Department, had taken a prowl car outside the city limits. Mrs. Janak and Mrs. Taurisano denied having made or heard any comments on matters not in evidence. Upon the basis of the testimony, the court found:

> "In substance, the jurors or some of them were told by other jurors during the trial and the deliberations: that the defendant had been in trouble all of his life; that he had been suspended from the police force in connection with the unauthorized use of a prowl car; that he had been involved in a fight in a tavern; that one of the juror's husband was an investigator and that he knew all about plaintiff's background and character, which was bad; and that petitioner's father was always getting him out of trouble."

Concluding that in consequence Owen had been deprived of his Sixth Amendment right of confrontation, therefore making it unnecessary to deal with the claim of a less than unanimous verdict, the judge set aside Owen's convictions and ordered his discharge, unless the State retried him within 60 days, this period to be extended pending any appeal. The State has appealed.

Appendix B.

Although the findings went to the verge permitted by the evidence at the post-trial hearing, the State does not and could not properly ask us to reject them as clearly erroneous. It contends rather that, accepting them, we should reverse as a matter of law.

Both parties recognize *Parker* v. *Gladden,* 385 U. S. 363 (1966), to be the starting point for discussion. That case makes it plain that if a baliff testified he had entered the jury room and had made statements such as the district court found were here made by jurors about Owen, the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth would require a judgment of conviction to be set aside. We think the result would be the same if a non-juror, who was neither a court officer nor a witness, admitted to having made such statements to the jury here. To be sure, in rejecting Oregon's argument in *Parker* that no harm could have resulted, the Court said, 385 U. S. at 365:

> This overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding for eight days and nights.

Cf. *Remmer* v. *United States,* 347 U. S. 227, 229-30 (1954). But that was written in a context where the bailiff's remarks were only an unsupported statement of opinion, "that wicked fellow . . . is guilty," and an assurance that any error by the jury in finding him so would be corrected by the Supreme Court. The Court might well have thought that if such statements had been made by a person who was neither a witness, cf. *Turner* v. *Louisiana,* 379 U. S. 466 (1965), nor an official, they would not have been weighty enough to constitute a prejudicial violation of a defendant's rights under the confrontation of due process clauses, *per contra* when made by an official, however lowly.

Appendix B.

The statements here found to have been made were sufficiently more damaging to Owen than the remarks of the "apparently Elizabethan-tongued bailiff" in *Parker*, 385 U. S. at 367 (dissenting opinion of Harlan, *J.*), that the added factor of official utterance would not be required to show prejudice.

If our analysis is correct up to this point, we must affirm unless (1) it makes a legally significant difference that the remarks here were by jurors rather than the hypothetical non-juror or (2) New York may lawfully rule out jurors' testimony as a source of proof of the facts here alleged or (3) petitioner has waived his rights.

Consideration of the first point takes us back to the jury's earliest days. The thirteenth century jury was selected not because of its ignorance but because of its knowledge. "The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge." 1 Holdsworth, A History of English Law 317 (3d ed. 1922). See also 2 Pollock & Maitland, The History of English Law 624-27 (2d ed. 1898). Members of the presenting jury were allowed to be members of the petty jury until a mid-14th century statute permitted challenge in cases of trespass or felony, 25 Edw. III, St. 5, c. 3 (1351-52). It was only gradually that the character of the petty jury changed. By 1468 Sir John Fortescue was "able to regard the jury as a body of impartial men who come into court with an open mind; instead of finding the verdict out of their own knowledge of the events, the parties or their counsel in open court present their evidence to the jury, and witnesses are examined upon oath." However, "jurors were still allowed to use their own knowledge in reaching a verdict, and might reach a verdict although no witnesses and no evidence had been produced." Plucknett,

Appendix B.

A Concise History of the Common Law 129-30 (5th ed. 1956). Another four centuries were to elapse before Parliament provided in 1856 that a jury "trial could be moved to the Central Criminal Court if it was feared that a local jury would not be impartial." *Id.* at 128.

The twentieth century American jury has moved a long way from its medieval origins. Today's juror must be "indifferent" and "[h]is verdict must be based upon the evidence developed at the trial." *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961). See also *Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907). Still we would not lightly assume that the jury's original role as the voice of the country may not sufficiently persist that neither the specific guarantees of an impartial jury and of confrontation nor the more general one of due process would be violated simply because jurors with open minds were influenced to some degree by community knowledge that a defendant was "wicked" or the reverse,[3] even though this was not in evidence. See *Irvin* v. *Dowd, supra,* 366 U.S. at 722-23. One, although by no means the only, purpose of the insistence on trial in the vicinage both in Article III, § 2, and in the Sixth Amendment, must have been to entitle a defendant to trial where he is known—and this may sometimes work against him rather than in his favor. Indeed there are still sections of the country where it might be impossible to find twelve jurors who were totally ignorant about a defendant. Moreover, to allow verdicts to be attacked merely for casual jury-room references on the basis of matters not in evidence would add unduly to the already fragile state of criminal convictions. See *United States* v. *McKinney,* 429 F.2d 1019, 1031-32 (5 Cir. 1970) (dissenting opinion of Judge Godbold). As Mr. Justice Clark observed, dissenting in *Rideau* v. *Louisiana,* 373 U.S. 723,

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[3] In saying this we assume the jurors made truthful answers to questions on the *voir dire.*

733 (1963), "it is an impossible standard to require that tribunal [the jury] to be a laboratory, completely sterilized and freed from any external factors."

While *Parker* v. *Gladden, supra,* consistently with the precedents it cites, demonstrates the Court's continuing concern with protecting a criminal defendant from the possibility of a verdict based on a consideration of facts not properly before the jury, it is thus not automatically determinative when the extra-record remarks are by jurors themselves. The invocation of the confrontation clause in *Parker* was entirely appropriate to shield the defendant from comments to the jury by one whose statements, if admissible at all, could have properly been received only from the witness stand, subject to the procedural safeguards which the Sixth Amendment requires. But, so far as we know, the Court has never suggested that jurors, whose duty it is to consider and discuss the factual material properly before them, become "unsworn witnesses" within the scope of the confrontation clause simply because they have considered any factual matters going beyond those of record. To resort to the metaphor that the moment a juror passes a fraction of an inch beyond the record evidence, he becomes "an unsworn witness" is to ignore centuries of history and assume an answer rather than to provide the basis for one.

Although accurate knowledge of what goes on in the jury room is unhappily limited, see Kalven and Zeisel, The American Jury vi-vii (1966), we suspect there are many cases where jurors make statements concerning the general credibility or incredibility of the police, the need of backing them up even when there is reasonable doubt of guilt or putting brakes upon them even when there is none, the desirability of overcoming reasonable doubt because of the repugnance of particular crimes or of yielding to less than reasonable doubt because of their insignifi-

cance and concerning other matters that would invalidate a judgment if uttered by a judge, see *id.* at 131-32.[4] Yet this is the very stuff of the jury system, and we have recognized, in a not unrelated context, that the standards for judges and juries are not the same, *United States* v. *Maybury,* 274 F.2d 899, 902-03 (1960). The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extra-record matter, with the supposed consequences that the infiltrator becomes a "witness" and the confrontation clause automatically applies, but the nature of what has been infiltrated and the probability of prejudice. See, e.g., *Rideau* v. *Louisiana, supra,* 373 U. S. at 727; *Estes* v. *Texas,* 381 U.S. 532, 542-43 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333, 351-52 (1966); *United States* v. *Crosby,* 294 F.2d 928, 950 (2 Cir. 1961), *cert. denied, sub nom. Mittelman* v. *United States,* 368 U.S. 984 (1962).

On the basis of Judge Port's findings, we think that in this case there was "such a probability that prejudice will result that it [the verdict] is deemed inherently lacking in due process." *Estes* v. *Texas, supra,* 381 U.S. at 542-43. To be sure, there is no "litmus paper test" for making such a determination. But a good definition of the right line has recently been drawn by Judge Goldberg in *United States* v. *McKinney,* 429 F.2d 1019, 1022-23 (5 Cir. 1970):

> All must recognize, of course, that a complete sanitizing of the jury room is impossible. We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system,

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[4] A few instances are reported in Broeder, The Impact of the Vicinage Requirements: An Empirical Look, 45 Nebr. L. Rev. 99, 106-09 (1966), and in *United States* v. *Miller,* 403 F. 2d 77, 84 n. 12 (2 Cir. 1968).

> and we cannot and should not excommunicate them from jury deliberations. Nevertheless, while the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra *facts* into the jury room. In every criminal case we must endeavor to see that jurors do not [consider] in the confines of the jury room . . . specific facts about the specific defendant then on trial. . . . To the greatest extent possible all factual [material] must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime.[5]

Owen's case falls on the impermissible side of this by no means bright line, although perhaps not by much. On the basis of the judge's findings, the jurors' statements went beyond Owen's being something of a ne'er-do-well; they included allegations of at least two specific incidents which had not been and probably could not have been received in

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[5] While the rule in *McKinney* was arguably established under the court's supervisory powers rather than as a matter of due process, neither the opinion nor the authorities there cited indicate that any such distinction was intended and we do not believe it properly could have been. We have slightly modified the excerpt quoted in the text, so as to eliminate any suggestion that jurors become "witnesses," with consequent automatic entailment of the confrontation clause, whenever a juror voices any extra-record facts. Indeed the *McKinney* court was careful to point out that the inquiry of the jurors on the remand was to be limited to the factual issue whether a discussion of facts outside the record did take place, but that the "trial court itself must decide the question of prejudice on the basis of an independent evaluation of all the circumstances of the case." 429 F. 2d at 1030. In short, the inquiry is not whether the jurors "became witnesses" in the sense that they discussed *any* matters not of record but whether they discussed specific extra-record *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.

evidence, and which Owen had had no opportunity to refute.

We thus reach the second asserted basis of distinction from the statements by a hypothetical non-juror with which we began, namely, that the evidence came from the jurors themselves. The State could not seriously contend that even if Owen were denied due process by virtue of the jury's consideration of prejudicial extra-record facts, New York law may independently foreclose him from challenging his conviction on federal constitutional grounds, cf. *Henry* v. *Mississippi,* 379 U. S. 443 (1965), and we do not understand it to be making such a contention. Rather, the State argues that we should be mindful of the compelling public policy considerations, emphasized by the Supreme Court, which underlie the general rule against juror's impeachment of their own duly rendered verdict:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed . . . in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

McDonald v. *Pless,* 238 U. S. 264, 267-68 (1915). Since the sole proof of prejudice in the instant case comes from the post-trial interrogation of the jurors with respect to what transpired during their deliberations, and since New York

evidence law, following the famous decision of Lord-Mansfield, *Vaise* v. *Delavel,* 1 T. R. 11 (K. B. 1785), has allegedly embraced this policy by clamping a tight seal on jurors' revealing what they heard in the jury room, *Dana* v. *Tucker,* 4 Johns. R. 487, 488 (1809)); *Clum* v. *Smith,* 5 Hill 560, 561 (1843); *Williams* v. *Montgomery,* 60 N. Y. 648 (1875), we are urged to refrain from carving an exception to a rule which, it is argued, represents a firmly imbedded policy of both New York State and federal courts.

While we have taken note of this policy, *Miller* v. *United States,* 403 F. 2d 77, 82 (2 Cir. 1968), we have also recognized, *United States* v. *Crosby, supra,* 294 F. 2d at 949-50, following the Supreme Court in *Mattox* v. *United States,* 146 U. S. 140, 149 (1892), that the prohibition is not an absolute. Indeed, as indicated above, we should have thought that the New York State evidence rule, so far as here relevant, had been eliminated by the second decision in *People* v. *DeLucia, supra,* 20 N. Y. 2d 275, 282 N.Y.S. 2d 526. We would read Judge Keating's opinion as in effect adopting for New York the rule of *Woodward* v. *Leavitt,* 107 Mass. 453, 466 (1871), approved in *Mattox* v. *United States, supra,* 146 U. S. at 149, that "a juryman may testify to any facts bearing upon the question of any extraneous influence, although not as to how far that influence operated on his mind,"[6] with "extraneous" including misby the State, that in *DeLucia* the jurors were testifying to misconduct outside the jury room, to wit, an unsupervised viewing of the scene of the crime by some of them,

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[6] Although we believe this to be the proper rule, see *United States* v. *Crosby, supra,* 294 F. 2d at 949-50, we do not underestimate its difficulties of application. The testimony taken in this very case drifted, almost inevitably, from what the jurors allegedly said to what its effect had been. This is a further consideration weighing in favor of a rather narrow definition of the kind of statement by a juror that will afford basis for invalidating a verdict. conduct by the jurors themselves. The distinction asserted

whereas here the misconduct was inside, will not wash. In the first place, it makes no sense, see *State* v. *Kociolek*, 20 N. J. 92, 100, 118 A. 2d 812, 816 (1955) (Brennan, *J.*); Proposed Rules of Evidence for the United States District Courts and Magistrates, § 6-06(b) and page 119 (1969). The State's approving citation of *United States* v. *Crosby, supra,* 294 F. 2d 949-50 (2 Cir.), indicates it would not assert that while a juryman could testify he had read a newspaper article with extra-record information outside the jury room, he could not reveal his communication of it to other jurors within that sanctum. There is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain. As we pointed out in *United States* v. *Crosby, supra,* 294 F. 2d at 950, it is the "nature of the matter and its probable effect on a hypothetical average jury," not the source of the information or the locus of its communication, which determines whether the defendant has been prejudiced. In the second place, the distinction would not explain *DeLucia* itself, since as appears from the court's opinion in *United States ex rel. DeLucia* v. *McMann,* 373 F. 2d 759, 761 (2 Cir. 1967)), the jurors' affidavits related to events inside as well as outside the jury room and the New York Court of Appeals drew no distinction on that score. However, if we were to take the inscrutable silence of the state courts to mean what the Attorney General says it does, we would be obliged to disregard a state evidentiary rule preventing what in this case is the only method of proving that the defendant had been denied due process by the jury's consideration of prejudicial extra-record facts. Cf. *American Ry. Exp. Co.* v. *Levee,* 263 U. S. 19, 21 (1923). We intimated as much in *DeLucia, supra,* 373 F. 2d at 762. We would reach the same result if the supposed New York rule barring a juror's statement

about improper statements within the jury room were viewed as being cast in terms of privilege.[7]

It remains only to consider the State's claim that Owen waived his right to complain of the jurors' misconduct by failing to object to the jury's containing persons who might avail themselves of knowledge about him *dehors* the record. Here we suffer from the handicap that all efforts to find the transcript of the *voir dire* of the jurors have been unsuccessful. At the hearing in the district court, Mr. Tierney, Owen's attorney, testified that he asked the jurors whether they knew Owen or his family, whether they knew of any reason why in fairness to the defendant they could not sit and whether anything they had discussed or read would affect or prejudice their deliberations. All these questions elicited negative responses except in the case of Mr. Jeffrey, who said he knew Owen casually but that this would not affect his judgment. Mr.

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[7] Wigmore states, 8 Evidence § 2346, p. 678 (McNaughton rev. 1961) that *"a juror is privileged not to have his communications to a fellow juror* [during retirement] *disclosed* upon the witness stand against his consent." The language and most of the citations bear upon the case where the juror is proceeded against for contempt, perjury, or obstruction of justice, as in *Clark* v. *United States,* 289 U. S. 1 (1933), although what Wigmore calls Mr. Justice Cardozo's "eloquent exposition of the policy" of the supposed privilege in that case seems in fact to leave little but the name. However, when Wigmore comes to impeachment of the verdict as such, while vigorously attacking Lord Mansfield's rule as, among other things, tempting the parties "to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings," *id.* at § 2353, p. 699, he also says that the privilege would apply "if the juror to be informed against should claim it." *id.* at § 2352, p. 695. Hence, as a practical matter, impeachment for misconduct in the jury room could be had only when the juror guilty of misconduct confessed. We find it hard to see how when a verdict is attacked by juror A's testimony about what juror B said or did in the jury room, the government has standing to invoke whatever privilege juror B may possess; whether juror B is privileged to have juror A's testimony excluded in a proceeding against him is another matter.

Jeffrey confirmed that Mr. Tierney had asked whether he knew Owen and that he acknowledged a casual acquaintance which, according to Jeffrey's post-trial testimony, was due to a single meeting at a testimonial dinner. Mrs. Janak testified that Tierney had asked whether she knew Owen and she had replied in the negative, which was true, although perhaps not quite the whole truth since she did know something about him. While counsel may have been at fault in not asking more directly whether the jurors knew anything concerning Owen that would affect their judgment, the State has not sustained its burden of showing that the defense consented that the jurors who were to try Owen could bring into the jury room specific factual material about him that was derived solely from their personal lives rather than the evidence adduced at trial.

Affirmed.

Appendix C.

COURT OF APPEALS STAYING MANDATE.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of January, one thousand nine hundred and seventy-one.

UNITED STATES ex rel. CRAIG S. OWEN,

Relator-Appellee,

v.

DANIEL J. MCMANN, Warden of Auburn State Prison, Auburn, New York,

Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated December 23, 1970 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) Federal Rules of Appellate Procedure be and it hereby is granted.

STERRY R. WATERMAN
HENRY J. FRIENDLY
WILFRED FEINBERG
Circuit Judges

Appendix D.

AFFIDAVIT OF THOMAS KASSOUF.

STATE OF NEW YORK

COUNTY COURT

COUNTY OF ONEIDA

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

CRAIG S. OWEN and PETER A. SEBREGANDIO,

Defendants.

STATE OF NEW YORK }
COUNTY OF ONEIDA } ss.:
CITY OF UTICA }

THOMAS KASSOUF, being duly sworn, deposes and says:

1. That your deponent was a juror, namely No. 12 juror, on the case of People vs. Craig S. Owen and Peter A. Sebregandio which was tried last month in the Oneida County Court. That after the case was submitted to us by the Judge, myself and the other 11 jurors retired for a deliberation period. After approximately some 15 hours of deliberation, the majority of the other jurors and I agreed that both Defendants were guilty on the charge of grand larceny only. Therefore, we wanted to find both Defendants guilty on the grand larceny charge only.

2. Although we wanted to find the Defendants guilty of grand larceny only, the foreman, Mr. Jeffery, told us that

we could not do so. He further told us that we must find both Defendants guilty on all 3 charges and we could not find either one or both of them guilty on one or two charges only. At this time I requested that Mr. Jeffery ask the Judge for instructions concerning that point. He refused to allow us to ask for those instructions.

3. During our deliberations, the foreman, Mr. Jeffery, and two of the other jurors, Mrs. Rose Janak and Mrs. Pearl Taurisano, informed the other jurors and me that they "knew all about" the Defendant, Craig Owen. They further indicated that they knew about unfavorable incidents in his life. These incidents were entirely unrelated to the trial. In fact, Mrs. Janak said that Craig Owen, one of the Defendants herein, was "no good." Furthermore, Mrs. Janak made the statement to the jurors that "my husband told me that he knew all about Craig Owen." In addition to this, the foreman, Mr. Jeffery, on several occasions made statements to the jurors that Craig Owen's father was always getting him out of trouble and that he also knew all about Mr. Owen's background. The jurywoman, Pearl Taurisano, further volunteered the information that in addition to her own knowledge as to the background of the Defendant, Craig Owen, that a neighbor had informed her that she, the neighbor, knew all about him, implying that he was guilty of this crime.

4. In view of these prejudicial remarks and after some 12 hours of deliberations, I requested that Mr. Jeffery secure some instruction to the effect that we should put prejudicial remarks and matters outside the Courtroom out of our deliberations and not to be considered. We filed out into the Courtroom and at that time Mr. Jeffery asked the questions and the Court advised that they had instructed us before and that any prejudicial remarks or

statements and all matters learned outside the Courtroom were not to be considered a part of the deliberations. We thereupon went back into the jury room and were met with the same attitude of the 3 jurors above mentioned.

5. Myself and a number of the other jurors voted guilty on grand larceny charges only. On leaving the jury room to report our verdict, it was agreed by and between myself and the majority of the other jurors that Mr. Jeffery would report our verdict as guilty on the grand larceny charge only as to both Defendants, and if we had to find them guilty on all charges that we would go back into the jury room and deliberate further. When Mr. Jeffery said "guilty on all 3 charges" and the rest of the jurors said yes, I said larceny as this was my verdict. When the Judge questioned me and told me that the foreman had announced the verdict of the jury as guilty on all the charges, I stood up to explain that I had voted for grand larceny only; the *Judge waved me down as if to shut me up, and I felt con*fused and further felt that I was denied the right to speak and refused an explanation. When the Judge questioned me as to my verdict, I reluctantly said yes because I figured that he was telling me by his mannerism that he agreed with the foreman and I must find them guilty on all 3 charges. My verdict was at the time of our deliberations, at the time of the rendering of the verdict, at the time of polling, and still is, both Defendants guilty on the grand larceny charge only, and I know this is the verdict of many of the other members of the jury.

6. Furthermore, that after some 13-14 hours of deliberation, we were called in by the Court and given instructions that the Court wished we could arrive at a verdict because it was getting to the wee hours of the morning, we had been together 13-14 hours, and that to retry this case would be a

tremendous expense to the County and an extreme hardship on all concerned, and that another jury would have to listen to all the weeks of evidence and testimony and that it would be to the best interests of all concerned, including the Defendants, if we could arrive at a verdict. These are the Judge's remarks as near as I can remember.

7. Thereupon, we returned to the jury room and felt that we had to arrive at a verdict. I felt that this was an undue hardship as we were being hurried into making a decision because of the wee hours of the morning.

THOMAS KASSOUF.

Sworn to before me this
6th day of April, 1966.

(Illegible Signature),
Notary Public.
Comm. Exp. 3/30/68.

Appendix E.

AFFIDAVIT OF RUSSELL TUCKER

STATE OF NEW YORK,
COUNTY OF ONEIDA—COUNTY COURT.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

PETER A. SEBREGANDIO and CRAIG S. OWEN,

Defendants.

STATE OF NEW YORK }
COUNTY OF ONEIDA } ss.:
CITY OF UTICA }

RUSSELL TUCKER, being duly sworn, deposes and says:

1. That your deponent was a juror in the case of People vs. Craig S. Owen and Peter A. Sebregandio which was tried last month in Oneida County Court. That after the case was submitted to us by the judge, myself and the other 11 jurors retired for our deliberation. That after some 13-14 hours of deliberation, myself and two of the other jurors had agreed that both Defendants were guilty on the grand larceny charge only. Therefore, we instructed the foreman, Earl Jeffery, to report to the Court that we found the two Defendants guilty in such a manner.

2. When the foreman, Earl Jeffery, reported to the Court "guilty on all 3 counts" I was shocked and I assumed from the Court's waiving at Mr. Thomas Kassouf when he announced to the Court "larceny" on being polled

and the Court seemingly refusing to allow Mr. Kassouf to explain his position, that perhaps Earl Jeffery was right when he instructed us that we must find the Defendants guilty on all 3 counts. This is the reason I said "yes" when the Court asked for my verdict, but my verdict was larceny only and I felt very strongly that the foreman did not follow my instruction as to the verdict.

3. During our deliberations, Mrs. Rose Janak and Mrs. Pearl Taurisano, two of the other jurors, the foreman, Mr. Earl Jeffery, informed the jury that they knew various things about Craig Owen and that they had reason to believe from outside information that he was guilty.

RUSSELL H. TUCKER

Sworn to before me this
6th day of April , 1966.

PETER E. TIERNEY
Com. of Deeds, City of Utica, N. Y.
Com. Exp. 12/31/66